UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PHILIP M. CIULLA, Appellant, v. U.S. POSTAL SERVICE, Agency.	DOCKET NUMBER DA07528810026 DATE: SEP 2 1988

Rudy Perez, Jr., American Postal Workers Union, Irving, Texas, for the appellant.

Jerome Batson, El Paso, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has petitioned for review of an initial decision issued on February 5, 1988, which affirmed the agency action removing him from his position with the U.S. Postal Service in Odessa, Texas. For the reasons below, the petition for review is GRANTED, and the initial decision is AFFIRMED as MODIFIED with respect to the penalty. *See* 5 C.F.R. § 1201.115. The removal action is mitigated to a 90-day suspension.

BACKGROUND

The appellant was removed from his position as a Distribution Clerk effective September 29, 1987, based on charges that on August 13, 1987, he had readdressed two magazines, one to his own Post Office box, and the other to his wife's, and that on that same date, he had taken a calculator from the "no obvious value mail" and converted it to his own use. *See* Notice of Proposed Removal, August 25, 1987, Appeal File, Volume II, Tab 4e. The magazines, second class mail, were undeliverable and were to be destroyed in accordance with agency procedures. The calculator, also undeliverable, was third class or bulk business mail and in accordance with Postal Service policy would be given to a charitable institution. It is undisputed that these items were of *de minimis* value. *See* Hearing Transcript at 44-45, 58; Initial Decision at 5 n.1. It is also undisputed that despite their *de minimis* value, it was a breach of Postal Service regulations to take these items from the salvage mail.

The administrative judge sustained the charges finding, *inter alia*, that the appellant had admitted his conduct to the postal inspectors and that he had stipulated to the charges before the Board. *See* Initial Decision at 2-3. She sustained the penalty of removal noting that the Postmaster, the deciding official, testified that he no longer had confidence in the appellant, and that other supervisors and co-workers felt the same way. She relied upon *Anderson v.*

U.S. Postal Service, 14 M.S.P.R. 442 (1983), in upholding the penalty of removal. *See* Initial Decision at 3-7.

The petition for review contends that the penalty should be mitigated, and that the deciding official was unaware of the need to consider mitigating factors pursuant to *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

ANALYSIS

In *Douglas v. Veterans Administration* at 305-06, the Board held that numerous factors must be considered in assessing the penalty, and that the purpose of its review of the agency's selection of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within tolerable limits of reasonableness. In this case the relevant factors are: (1) the nature and seriousness of the offense; (2) the employee's job level and type of employment; (3) the employee's past disciplinary record; (4) the employee's length of service; (5) the effect upon his supervisors' confidence in him; (6) the notoriety of the offense; (7) and the appellant's potential for rehabilitation.

The agency deciding official, who was unfamiliar with *Douglas*, testified at the hearing that he considered the appellant's past employment record, including his 19 years of satisfactory service, the absence of any past disciplinary action and his extremely good attendance record. He believed, however, that the appellant "just

wouldn't be trusted by the Supervisors." *See* Hearing Transcript at 53-55. He also stated that he believed the appellant had no chance of being rehabilitated. *Id.* at 56. He testified that he viewed all offenses relating to theft of mail alike, regardless of whether the employee involved was a supervisor or a subordinate; whether the theft was from mail such as first class or special delivery as opposed to mail that was undeliverable; and regardless of the amount of the theft. "Theft of mail is theft of mail." *Id.* at 57- 59.

We find that, under these circumstances, the deciding official failed to exercise appropriate discretion with respect to the penalty. He failed to give sufficient probative weight to all of the factors present in this case. His singular belief that all theft should be treated alike negates all possibility of mitigation, despite the presence of mitigating factors. Such an approach was rejected by the U.S. Court of Appeals for the Federal Circuit in *Miguel v. Department of the Army*, 727 F.2d 1081 (Feb. 7, 1984). The court declined to uphold the removal of a commissary cashier for the theft of government property valued at $2.10, and stated that while the penalty for misconduct is "left to the sound discretion of the agency," there was an "abuse of discretion" under the facts of the case. *Id.* at 1083. In so finding, it stated in pertinent part: "Theft of Government property is indeed a very serious offense, but there appears to have been little recognition of the *de minimis* nature of the objects taken." *Id.* at 1084. It

further stated: "Under the facts of this case the penalty of removal amounted to an abuse of discretion which failed responsibly to balance all of the relevant factors." *Id.* at 1086.[1]

Because the deciding official treated all theft alike and apparently believed that any theft warranted removal, he failed to properly consider the relevant factors and thus did not exercise sound discretion with regard to the penalty in this case. Therefore, we will balance the relevant factors.

While the theft of mail is very serious, we note that the mail involved was of *de minimis* value and was undeliverable. This was the appellant's first offense in a 19 year career with the Postal Service. His employment record was satisfactory, and he was extremely reliable and dependable because he almost never used sick leave and was late only once in his career. While the deciding official opined that all supervisors and other co-workers had lost confidence and trust in the appellant, this was not corroborated by any other evidence. The deciding official's opinion that the appellant is not a good prospect for rehabilitation is again merely conclusory and the record evidence does not support the conclusion. The appellant

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[1] *See also DeWitt v. Department of the Navy*, 747 F.2d 1442, 1445 (Fed. Cir. 1984), where the court upheld removal for theft of $14.00 worth of groceries noting the agency's "reasoned concern" for the factors appropriate to evaluating a penalty, and finding that "it is the responsible exercise of discretion that is the fundamentally distinguishing factor" from *Miguel*.

readily admitted his conduct, and at the hearing stated that he was "deeply sorry." *See* Hearing Transcript at 106. There is no showing that the appellant's offense will have a lasting effect upon his ability to perform his assigned duties, and there is no showing of any notoriety in connection with the offense.

We note that the Board mitigated the penalty of removal to a sixty-day suspension where a custodian took a wristwatch and a pair of binoculars from undeliverable mail. The Board noted the seriousness of the conduct but also considered, *inter alia*, the *de minimis* value of the mail, the fact that it was undeliverable, the appellant's 18 years of employment, and the fact that he had admitted the conduct to the postal inspectors. *See Smith v. U.S. Postal Service*, 31 M.S.P.R. 508 (1986). Although that case is distinguishable from the instant case because, as a custodian, that appellant did not have direct responsibility for the custody and control of mail, the Board also mitigated the penalty of removal to a thirty-day suspension where a window clerk converted a $10.00 money order to his own use when he endorsed it to a charitable organization. The Board found that there was no demonstrable harm to the reputation of the agency, and the appellant had 11 years of satisfactory service with no past disciplinary record. *See Ballenger v. U.S. Postal Service*, 21 M.S.P.R. 741 (1984). *See also Oberman v. U.S. Postal Service*, 13 M.S.P.R. 218 (1982), where the removal of a Postal Service Police Officer for theft of undeliverable magazines destined for

destruction was mitigated to a thirty-day suspension, despite the higher standard of conduct expected of him, based on his 33 years of satisfactory service, his reputation for honesty, the lack of a prior disciplinary record, the *de minimis* value of the magazines, and no showing that the offense would have a lasting effect upon his ability to perform his duties.[2]

In this case, as the administrative judge recognized, the Postmaster had lost confidence in the appellant. Nonetheless, when the mitigating factors are considered, the penalty of removal is not within the bounds of reasonableness. Under the facts and circumstances of this case, we find that the maximum reasonable penalty is a ninety-day suspension. This penalty recognizes the seriousness of the offense and its stringency will serve to ensure that the appellant refrains from such conduct in the future. Furthermore, the severity of the penalty will put other employees in the Odessa Post Office on notice that such conduct will not be tolerated. That Office has had no incidents of such misconduct in the past, and obviously wishes to assure the continued sanctity of the mail.

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[2] The administrative judge's reliance upon *Anderson v. U.S. Postal Service*, 14 M.S.P.R. 442 (1983), is misplaced. That case involved a supervisory employee who removed from the mail two special delivery letters that were not undeliverable. Here, the appellant is not a supervisor and the mail was not first class, deliverable mail. Thus, the offense in the instant case is less serious than in *Anderson*. Similarly, the Board declined to mitigate the penalty of removal where a Postmaster had misappropriated the contents of two letters. *See Henscheid v. U.S. Postal Service*, 14 M.S.P.R. 42[illegible] (1983).

ORDER

This is the final Order of the Merit Systems Protection Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

The agency is ORDERED to cancel the appellant's removal and to replace it with a ninety-day suspension retroactive to the date of the removal. This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to award back pay and benefits in accordance with its regulations. *See* [illegible] v. *Federal Aviation Administration*, 24 M.S.P.R. 25 (1984), *Robinson v. Department of the Army*, 21 M.S.P.R. 270 (1984).

The agency is ORDERED to complete all computations and issue a check to the appellant for the appropriate amount of back pay within sixty days of the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay due.

If there is a dispute as to the amount of back pay due, the agency shall issue a check to the appellant for the amount not in dispute within the above time frame. The appellant may then file a petition for enforcement concerning the disputed amount.

The agency is ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in

furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

If, after being informed by the agency that it has complied with the Board's order, the appellant believes that there has not been full compliance, the appellant may file a petition for enforcement with the regional office within thirty days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.